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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1738

RICHARD NIXON,
Petitioner,

v.

A. ERNEST FITZGERALD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Richard Nixon petitions this Court for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The district court's order of March 26, 1980, denying petitioner's motion for summary judgment on grounds, *inter alia*, of absolute immunity from suit for civil damages arising from actions taken as President (App. A, *infra*, 1a-5a) is not yet officially reported. The order of the court of appeals granting respondent's motion

to dismiss the appeal of the district court's order (App. D, *infra*, 35a-36a) is not yet officially reported.

JURISDICTION

The order of the district court petitioner seeks to have reviewed was entered on March 26, 1980. On April 10, 1980, petitioner filed a timely notice of appeal from that order in the district court. The case was docketed in the United States Court of Appeals for the District of Columbia Circuit on April 14, 1980. *Fitzgerald v. Butterfield, et al., Richard Nixon, appellant,* No. 80-1407. On April 24, respondent filed a motion to dismiss the appeal or for summary affirmance, citing *Halperin, et al. v. Kissinger, et al.*, 606 F.2d 1192 (D.C. Cir. 1979), as the controlling law on the issue being appealed. The motion to dismiss was granted April 30, 1980. The jurisdiction of this Court to review the instant case is invoked under 28 U.S.C. 1254(1) and 2101(c), and the collateral order doctrine expressed in *Helstoski v. Meanor,* No. 78-546 (June 18, 1979); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541; *Coopers & Lybrand v. Livesay,* 437 U.S. 463, and *Forsyth v. Kleindienst,* 599 F.2d 1203, 208 (3d Cir. 1979), *pet. for cert. filed, sub nom. Mitchell v. Forsyth,* No. 79-1120 (January 18, 1980).

QUESTIONS PRESENTED

1. Whether a President is absolutely immune from civil damage liability for actions taken, or for failures to act, while President of the United States.

2. Whether the decision of the district court denying a President the defense of absolute immunity from civil damages and ordering trial to commence on the merits is appealable as a collateral order.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent's claims against petitioner are based upon the First Amendment, 5 U.S.C. § 7211, 18 U.S.C. § 1505, and the District of Columbia's common law torts of intentional infliction of mental distress and interference with advantageous economic relationships. The texts of the constitutional and statutory provisions are reprinted in Appendix B.

STATEMENT

This case presents for review the identical issue concerning a President's liability for civil damages raised by the Solicitor General on Mr. Nixon's behalf in *Kissinger, et al. v. Halperin, et al.*, No. 79-880 (filed December 7, 1979). It raises the issue, however, in the context of a civil service employee whose employment was terminated by the Air Force in an executive branch reorganization and who claims that Mr. Nixon is liable for money damages because he either approved the decision to fire him or failed to reinstate his employment after being informed that the termination was retaliatory.

RESPONDENT'S LOSS OF EMPLOYMENT

Two months before the end of President Johnson's term in office, Ernest Fitzgerald, then Deputy Assistant Secretary for Management Systems of the Department of the Air Force, met with staff members of Senator

Proxmire's Subcommittee for Economy in Government and discussed Mr. Fitzgerald's assessment of the potential cost overruns in the military's development of the C-5A air transport. Shortly after that meeting, Fitzgerald was asked to appear in public session before the subcommittee and there revealed that, in his opinion, the Defense Department was facing approximately $2 billion in development costs beyond original estimates.

Following that testimony, Fitzgerald received notification that his career civil servant status, which he had received shortly before the date of his congressional testimony, was being revoked. This incident in the closing days of the Johnson Administration prompted subsequent congressional hearings into the matter, at which time officials of the Defense Department, including the new Secretary of Defense, Melvin Laird, assured committee members that Fitzgerald would not be subjected to retaliation.

Nearly a year after his testimony, in connection with a general reorganization of the Department of the Air Force and a reduction in defense and government manpower generally, Fitzgerald's job was abolished and his employment terminated. The reorganization was announced November 3, 1969, effective January 5, 1970. Because of the publicity surrounding Fitzgerald's congressional testimony and the revocation of his career status by the prior administration, President Nixon's staff anticipated that he would be questioned about the Air Force's action at his next scheduled press conference on December 8, 1969. In preparing the President for the press conference, the staff submitted several memoranda outlining the fact that Fitzgerald's job had been abolished and warning that this action would be perceived by the public and press as retaliatory. Because

Fitzgerald's C-5A disclosures were not an embarrassment to the Nixon Administration, two staff members recommended that the President overrule the Secretary of the Air Force and order Fitzgerald reinstated, or that Fitzgerald be found other government employment in an area separated from those with whom he had evidently developed an antagonistic relationship.

After the December 8, 1969 press conference at which he was in fact asked about and promised to look into Fitzgerald's situation, President Nixon requested that Fitzgerald be given a job in the White House Bureau of the Budget. When BOB Director Robert Mayo counseled that such a position would be unwise because of Fitzgerald's reputed status as a pipeline to Senator Proxmire, President Nixon did not press the matter, but instead requested that his staff pursue other alternatives. However, he never overruled the Air Force's decision to terminate Fitzgerald. On January 5, 1970, Mr. Fitzgerald left government employment without an offer of another position.

RESPONDENT'S C.S.C. LITIGATION

Fitzgerald challenged his termination before the Civil Service Commission and, in 1973, an evidentiary hearing was held concerning that matter. During those hearings Air Force Secretary Seamans testified that he had made the decision to include Fitzgerald's job among those eliminated in the reorganization plan based upon recommendations from his staff. On grounds of executive privilege, Seamans refused to disclose any advice he had received from the White House concerning that decision.

A reporter, Clark Mollenhoff, who was covering the 1973 CSC proceedings and who in 1969, as a member of the White House staff, had recommended to President

Nixon that Fitzgerald's employment be continued, confronted President Nixon about Seamans' invocation of the privilege at a scheduled press conference the next day. In the exchange between Mollenhoff and the President that followed, Mr. Nixon stated that he personally had made the decision to terminate Fitzgerald and that he stood by it. In conversations with his staff following the press conference Mr. Nixon discovered that he had confused Mr. Fitzgerald with another individual. This discovery prompted a retraction the next day by the President's press secretary.[1]

The CSC hearings then in progress continued for several more weeks. At their conclusion, the hearing examiner found that although Fitzgerald's termination was not in retaliation for his congressional appearances, it nevertheless involved personal factors unique to him. Consequently, the elimination of his job under the rubric of a reorganization was declared invalid, and Fitzgerald was ordered reinstated by the Air Force to the same or an equivalent position. He was also awarded back pay to the date of his termination.

RESPONDENT'S CIVIL SUIT

Claiming that the CSC's action was inadequate to compensate him for the damages he had suffered, Fitzgerald commenced a civil action in January 1974 against various Defense Department personnel, including Air Force

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[1]The record in this case includes transcripts of the several tape recorded private conversations in the Oval Office, after the press conference, in which Mr. Nixon discovered his error. Fitzgerald contends that the dialogue is ambiguous and that he is entitled to have a jury decide, as a factual matter, whether Mr. Nixon erred in saying that he had ordered Fitzgerald fired. The transcripts of those conversations prepared by the National Archives are reprinted in Appendix C.

Secretary Seamans. Based upon an internal White House memorandum to other staff members, written by Alexander Butterfield in January 1970, in which he advocated that Fitzgerald not be given another job in the government, Butterfield was included in the suit as an alleged co-conspirator. Because the suit was commenced more than three years after the effective date of Fitzgerald's termination, the district judge granted the defendants' motions for summary judgment based on the statute of limitations. *Fitzgerald v. Seamans, et al.*, 384 F. Supp. 688 (D.D.C. 1974). The court of appeals affirmed as to all Defense Department personnel, but concluded that because Fitzgerald had no reason to know prior to 1973 of any White House involvement in the decision to fire him, Fitzgerald's claim against White House personnel was not barred. *Fitzgerald v. Seamans, et al.*, 553 F.2d 220 (D.C. Cir. 1977).

On remand, nine years after his employment was terminated, Fitzgerald amended his complaint to add as defendants Mr. Nixon and Bryce Harlow, who had served as both an Assistant and Counsel to the President for congressional relations. Fitzgerald claims that the defendants conspired to violate his First Amendment rights and to punish him for testifying before Congress. At this stage the district court has ruled that the complaint not only states a claim under the First Amendment, but that the case also can proceed to trial in June based upon implied causes of action under 5 U.S.C. § 7211 (employees' right to petition Congress) and 18 U.S.C. § 1505 (injuring a congressional witness is a felony). In addition, the district court has held that the complaint adequately states causes of action under the District of Columbia's tort law for intentional infliction of mental distress by outrageous conduct and intentional inter-

ference with economic advantage. Fitzgerald is seeking $500,000 in compensatory damages and three million dollars in punitive damages.

THE DISTRICT COURT'S DECISION

Upon Mr. Nixon's being named as a defendant in the action, the Justice Department moved on his behalf to dismiss the complaint or for summary judgment on grounds that a former President is entitled to absolute immunity from civil liability for the actions Fitzgerald alleges. Judge Gesell, who subsequently sat by designation as a member of the court of appeals' panel that ruled adversely to Mr. Nixon in *Halperin, et al. v. Kissinger, et al., supra,* denied the motions based on the state of the record at that point. After extensive discovery by all parties, Mr. Nixon renewed his motion for summary judgment. In the interim, the court of appeals issued its decision in *Halperin, et al. v. Kissinger, et al., supra.* Citing that decision as the law in the circuit on the issue of absolute presidential immunity, Judge Gesell denied the summary judgment motion. (App. A, *infra*, 1a-5a.)

Because an order denying the defense of absolute immunity is appealable as a collateral issue (*see* note 2, *supra*), Mr. Nixon filed a timely notice of appeal as to that issue. He also moved to stay the trial, which is scheduled to begin on June 4, pending this Court's decision on the petition in *Kissinger.* The district court denied the motion.

THE COURT OF APPEALS' DECISION

Ten days after the appeal was docketed, and while petitioner was readying a petition for certiorari before judgment directed to the absolute immunity issue, respondent filed a motion to dismiss the appeal or

for summary affirmance of the district court's order. Respondent argued that there was no jurisdiction for the appeal because the absolute immunity issue was not "an unsettled question" in the District of Columbia Circuit in view of that court's decision in *Halperin, et al. v. Kissinger, et al., supra,* and thus did not qualify as a final order under the "collateral order" doctrine. On April 30, 1980, the court of appeals, without stating the basis for its decision, granted the motion to dismiss the appeal. (App. D, *infra,* 35a-36a.)

REASONS FOR GRANTING THE PETITION

1. This case presents not only an unsettled issue which the Solicitor General has described as of exceptional importance to the functioning of the Presidency but one which will continue to arise with increasing frequency until this Court resolves it. The petition for certiorari in *Kissinger* presents for this Court's review the first case in which an appellate court has ever ruled that a President of the United States may be held personally liable in money damages for the actions he takes during his conduct of that office. The Solicitor General has persuasively articulated the far-reaching ramifications of the *Kissinger* decision and has effectively demonstrated the absence of sound legal or policy justification for the court of appeals' departure from prior judicial rulings on this point. Among other things, the Solicitor General has noted that the court of appeals' action places all future Presidents in the intolerable position of having to make every decision in contemplation of the fact that at some later stage an aggrieved party will ask a district court and jury to sit in judgment of his conduct and will be forced to defend at great expense the correctness of his actions.

We will not reiterate the manifold reasons the Solicitor General has provided the Court for granting certiorari on this issue. They are compelling, and petitioner adopts them in whole. The purpose of this petition is to alert the Court that there are cases, such as this, already pending which illustrate the detrimental impact of the court of appeals' denial of an absolute immunity defense to a President. For several reasons this case presents an ideal vehicle for the members of this Court to consider the issue. Therefore, we urge that the Court grant both the petitions here and in *Kissinger*, thereby viewing the issue not only in diverse contexts but in the kind of situations that are certain to follow should the President not be afforded absolute immunity from civil damage claims.

2. The respondent in *Kissinger* has opposed the petition in that case arguing that the factual circumstances there are so unique that the court of appeals' decision does not establish a broad-based precedent likely to spawn damage suits against other Presidents. This case proves otherwise. Although this case, too, is against Mr. Nixon, it does not involve any of the activities cited by the House of Representatives in the articles of impeachment, nor is the alleged conduct such as to have invoked widespread public disapprobation. To the contrary, it arises out of the very kind of activities a President confronts daily and, given the pressures of the President's immense responsibilities, it demonstrates that a mistaken judgment on what at the moment may seem to be a trivial matter—indeed, an internal executive branch personnel dispute—can later threaten his entire personal estate.

In this particular case it is an aggrieved civil servant who claims that the President either approved his unlaw-

ful termination or failed to reinstate his employment. Out of that alleged "approval" or "failure to reinstate," respondent has spun one constitutional, two implied statutory, and two common law causes of action. While the parties dispute whether Mr. Nixon ever "approved" the decision to terminate Fitzgerald, there is no question but that he "failed to reinstate" him. The district court found these allegations sufficient to allow the jury to decide not only whether Mr. Nixon should be held liable for actual damages, but also whether he should suffer the additional burden of punitive damages because he acted with malicious intent.

If, as this case illustrates, a President can be required many years after the fact to establish that his actions or failures to act were benevolent, no President can govern without constant concern for his own and his family's future financial security. What at present is a suit by a civil servant may well become a suit by an Olympic athlete who claims that the President has intentionally violated his rights in precluding him, but not others, from traveling to the Soviet Union. What today is a suit by a White House staff member whose phone has been tapped to discover the source of leaked information, may become a suit by a foreign service employee claiming that he was held hostage for an excessive period while the President delayed remedial action for political purposes or prolonged his imprisonment by conducting a military action without complying with the War Powers Act. Once the barrier against suing a President for damages is removed, no theory of liability remains implausible. The case can be brought, and if the trial court is sympathetic, it can be pursued to the point of the President either attempting to prove his good faith to a jury, or having to compromise the suit in order to

avoid financial ruin. In either case, the costs, not only to the individual but to the public in terms of impairing the President's decisionmaking ability, are enormous.

3. The court of appeals in *Halperin, et al. v. Kissinger, et al., supra,* suggested that the safeguard against vexatious lawsuits against high government officials who, in that court's view, are entitled only to qualified immunity, is to be found in the district court's sensitivity to that problem. (*Kissinger,* Pet. for Cert., App. A, 38a-41a.) However, this case shows the practical ineffectiveness of such an admonition to the district courts. Ironically, it was Judge Gesell, sitting as a member of the appellate panel in *Kissinger,* and later bound, of course, by the majority's opinion, who pointed out that disposing of a case against a President at the pre-trial stage on qualified, rather than absolute, immunity grounds is virtually impossible and comes at great expense to the functioning of our government. (*Halperin,* App. A, 51-52.)

> We should not close our eyes to the fact that with increasing frequency in this jurisdiction and throughout the country plaintiffs are filing suits seeking damage awards against high government officials in their personal capacities based on alleged constitutional torts. Each such suit almost invariably results in these officials and their colleagues being subjected to extensive discovery into traditionally protected areas, such as their deliberations preparatory to the formulation of government policy and their intimate thought processes and communications at the presidential and cabinet levels. Such discovery is wide-ranging, time-consuming, and not without considerable cost to the officials involved. It is not difficult for ingenious plaintiff's counsel to create a material issue of fact on some element of the [qualified]

immunity defense where subtle questions of constitutional law and a decision maker's mental processes are involved. A sentence from a casual document or a difference in recollection with regard to a particular policy conversation held long ago would usually, under the normal summary judgment standards, be sufficient. In short, if these standards are those to be followed in these cases, trial judges will almost automatically have to send such cases to full trials on the merits.

The effect of this development upon the willingness of individuals to serve their country is obvious. Not only are the personal funds of such officials placed at hazard but many of these cases are political in character, involve highly controversial acts, and will necessarily embroil juries in passing upon the intricacies of executive decisionmaking.

4. The respondent in *Kissinger* also argues against a grant of that petition because a resolution of the absolute immunity issue there in the petitioners' favor would apply only to the constitutional, not the Title III claim. In this case, because the district court has upheld Fitzgerald's right to sue petitioner for alleged violation of two District of Columbia common law provisions, this case even opens the door to litigation in any state court in which a plaintiff can find a sufficient nexus to gain *in personam* jurisdiction over the President. Consequently, this case permits the Court to decide whether a President is entitled to absolute immunity from all types of causes of action for damages.

5. The dismissal of the appeal below does not impair the Court's ability to grant certiorari on the absolute immunity issue.[2] The district court's order

[2]We recognize that the Court could grant certiorari on the appealability issue, reverse the order dismissing the appeal, and

[footnote continued]

which, based upon the court of appeals' earlier ruling in *Halperin, et al. v. Kissinger, et al., supra,* refused to recognize a President's right of absolute immunity from civil damage liability raises a collateral issue for which appellate jurisdiction is available under 28 U.S.C. § 1291. *See Helstoski v. Meanor,* No. 78-546 (June 18, 1979); *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541; *Coopers & Lybrand v. Livesay,* 437 U.S. 463. The Court concluded in *Helstoski, supra,* that an order denying the defendant absolute immunity based on the Speech or Debate Clause was final for purpose of appeal because there was nothing further to be done in the district court on the matter, and in the absence of an opportunity to appeal at that stage the purpose of the defense would be nullified. The same is true here. The purpose of the absolute immunity defense for a President is to obviate the need for him to justify his actions to a jury at a civil trial. The district court's refusal to recognize that defense constitutes a final determination of the matter, and if trial proceeds, the purpose undergirding the defense in negated.[3]

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remand the case to the court of appeals for consideration of the absolute immunity issue. However, in view of the fact that it is the District of Columbia Circuit Court of Appeals' decision on absolute immunity for a President that is already pending before this Court on a petition for certiorari in *Kissinger,* there is no reason to believe that further review by the court of appeals is necessary in this case. Consequently, granting certiorari as to the immunity issue now would be the equivalent of granting certiorari before judgment following a remand.

[3]The court of appeals' dismissal of the appeal for lack of jurisdiction creates a split in the circuits on the question of whether an order denying the absolute immunity defense is appealable before trial. *See Forsyth v. Kleindienst,* 599 F.2d 1203 (3d Cir. 1979), *pet. for cert. filed, sub nom. Mitchell v. Forsyth,* No. 79-1120 (January 18, 1980), and *Clark, et al. v. United States,*

[footnote continued]

6. The necessity for granting the petition for certiorari is particularly acute in this case. The trial, which is estimated to last four weeks, will involve approximately fifty witnesses, and which will entail disrupting the affairs of government officials from three administrations, including members of President Carter's staff, is now scheduled to commence June 4. The trial judge has refused to postpone the trial date even pending this Court's action on the petition in *Kissinger*. A principal purpose of the absolute immunity defense for a President, of course, is to protect him from having to commit himself and his personal resources to defending before a jury the correctness of his decisions while in office. Deferring consideration of this petition or the absolute immunity issue in this case until after the June trial would be tantamount to denying the defense without consideration of its merits. For that matter, should petitioner prevail at trial there is no assurance that the immunity issue would again reach this Court, particularly in the pristine form it is now presented. Yet, even if petitioner is successful on the merits, he will have incurred, without remedy, the very expense and exposure to financial jeopardy that the absolute immunity defense is intended to obviate. Thus, both as a matter of law and of practical necessity, the case is in the best possible procedural posture at this moment for review of the absolute immunity issue.

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481 F. Supp. 10 (S.D.N.Y. 1979), 2d Cir. Nos. 80-6016, 80-6024 (motions to dismiss for lack of jurisdiction, denied March 11, 1980). Indeed, the court of appeals' decision in this case is inconsistent with another decision of that court. *See McSurely v. McClellan*, 521 F.2d 1024 (D.C. Cir. 1975), *en banc*, 553 F.2d 1277 (D.C. Cir. 1976). This inconsistency in the circuits constitutes additional grounds for granting the writ.

CONCLUSION

The petition for a writ of certiorari should be granted, together with the petition in *Kissinger*, and the cases should be consolidated for purpose of argument.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-178
[Filed Mar 26 1980]

A. ERNEST FITZGERALD,

Plaintiff,

v.

ALEXANDER P. BUTTERFIELD, et al.,

Defendants.

ORDER

Upon consideration of defendants' motions for summary judgment, the opposition thereto, and the entire record herein, it is hereby

ORDERED that defendants' motions are denied in the following respects:

A. Causes of Action

For reasons set forth more fully in the Court's Order of April 27, 1979, plaintiff has stated the following triable causes of action against each of the three defendants.

1. Plaintiff states a cause of action for damages under the First Amendment to the United States Constitution based on defendants' alleged retaliation for plaintiff's having exercised his rights of free speech and petition.

2. Plaintiff states a cause of action for damages under 5 U.S.C. § 7211 (1976 & Supp. II, 1978).

3. Plaintiff states a cause of action for damages under 18 U.S.C. § 1505.

4. Plaintiff states a cause of action under District of Columbia law for intentional infliction of mental distress by extreme and outrageous conduct.

5. Plaintiff states a cause of action under District of Columbia law for intentional interference with (existent and prospective) economic advantage.

The gravamen of the alleged conspiracy is the participants' knowing intent to terminate plaintiff's employment with the Air Force and to prevent his reinstatement as a government employee in retaliation for his congressional testimony. Summary judgment for a defendant at this stage requires him to show either that he lacked knowledge that the adverse personnel actions taken were retaliatory, or that he lacked an intent to approve this specific aspect of government conduct, or that he took no action in furtherance of such a dismissal and/or obstruction. Plaintiff has established genuine issues of fact as to each of these matters regarding the conduct of all three defendants. Thus, these are issues for the jury to resolve.

B. Immunity

Absolute immunity is not available either to defendant Nixon as a former President or to defendants Harlow and Butterfield. *Butz v. Economou*, 438 U.S. 478 (1978); *Halperin v. Kissinger*, 606 F.2d 1192 (D.C. Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3467 (Dec. 7, 1979). In order to establish qualified immunity, each defendant must show that he was acting "within the outer perimeters" of his responsibilities, that any action taken was performed without malicious intent to deprive plaintiff of constitutional or other rights, and that it was reasonable to believe that any action taken was legal. *Butz v. Economou*, *supra*; *Halperin v. Kissinger*, *supra*. *See Wood v. Strickland*, 420 U.S.

308 (1975). Genuine issues of fact remain as to the scope of each defendant's responsibilities, the objective reasonableness of any beliefs each may have had concerning the legality of his alleged conduct in the Fitzgerald matter, and the subjective good faith underlying such conduct.

In analyzing the reasonableness of defendants' beliefs as predicates to the alleged wrongful conduct, the Court has considered the unique demands placed on the time and energies of defendant Nixon as President. *Scheuer v. Rhodes*, 416 U.S. 232, 247-49 (1974); *Halperin v. Kissinger*, *supra*, 606 F.2d at 1212-13. There is, however, ample evidence in the record that Fitzgerald's predicament was not simply one of a disgruntled civil servant. Both members of Congress and the press identified plaintiff's case as being of great public importance throughout 1969. Factual circumstances surrounding his termination were repeatedly raised for the President's attention. Moreover, the conduct complained of has long been prohibited by criminal statute, a statute to which Mr. Nixon personally gave strong support while a member of the United States Senate. The Court is unable to conclude at this time that Nixon's beliefs regarding any alleged failure to meet a statutory or constitutional obligation imposed on him were reasonable as a matter of law.

C. Punitive Damages

Punitive damages may be awarded against any defendant whose actions in contravention of statutory or common law have been shown to be malicious or in reckless disregard for the rights of others. *Knippen v. Ford Motor Co.*, 546 F.2d 993, 1002 (D.C. Cir. 1976); *Nader v. Allegheny Airlines, Inc.*, 512 F.2d 527, 549-51 (D.C. Cir. 1975), *reversed on other grounds*, 426 U.S.

290 (1976). Because genuine issues of fact remain with respect to the subjective good faith underlying each defendant's conduct, it has not been established that such damages are unavailable as a matter of law. Should the facts of this case developed at trial warrant an award of punitive damages, such an award would be recoverable at common law or under plaintiff's statutory claims. A similar recovery based on any finding of First Amendment violations does not appear to be constitutionally interdicted. *See generally Dellums v. Powell*, 566 F.2d 167, 209 (D.C. Cir. 1977) (Leventhal, J. concurring); *Payne v. Government of Dist. of Columbia*, 559 F.2d 809, 827-27 (Tamm, J. concurring).

D. Statute of Limitations

The motions based on the Statute of Limitations are denied for reasons set forth in a separate Memorandum filed herewith.

It is further

ORDERED that defendants' motions for summary judgment are granted in the following respects:

1. Plaintiff having voluntarily withdrawn his claim under the Fifth Amendment to the United States Constitution, this claim is hereby dismissed.

2. Plaintiff having withdrawn his contention that defendants are in any way liable in connection with initiating the 1969 investigation of him by the Air Force Office of Special Investigations ("OSI"), this matter shall not be prosecuted at trial. Evidence regarding the subsequent use of OSI investigation results or charges shall not be admissible at trial absent a clear showing of relevance and good cause.

It is further

ORDERED that the dates and times for pretrials and trials as set by this Court's Order of November 19,

1979, are modified to reflect a change in the time of Pretrial No. 2 and the date of the trial:

First Pretrial: May 2, 9:30 a.m.
Second Pretrial: May 12, at *2:00* p.m.
Final Pretrial: May 22, at 9:30 a.m.
Trial: June *4*, at 9:30 a.m.

/s/ Gerhard A. Gesell
United States District Judge

March 26, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-178

[Filed Mar 26 1980]

A. ERNEST FITZGERALD,

Plaintiff,

v.

ALEXANDER P. BUTTERFIELD, et al.,

Defendants.

MEMORANDUM REGARDING STATUTE OF LIMITATIONS

Plaintiff, a former Air Force weapon systems analyst, seeks relief against former President Nixon and two White House associates in this civil conspiracy damages action stemming from his discharge in 1969. Following years of litigation against a dwindling number of government officials, the Court has for consideration separate motions for summary judgment made on behalf of these three remaining defendants. On the basis of exhaustive discovery, defendants individually claim that plaintiff is barred from proceeding by the applicable three-year Statute of Limitations, D.C. Code § 12-301(8) (1973).

One defendant, Butterfield, was previously dismissed by reason of the Statute of Limitations but reinstated after a protracted appeal, *Fitzgerald v. Seamans*, 553 F.2d 220, (D.C. Cir. 1977). Following remand, defendants Nixon and Harlow were added and the cause of action given greater specificity by a Second Amended Complaint filed September 14, 1978. After limited discovery, the Court on April 27, 1979, denied motions for summary judgment addressed to the Statute of

Limitations issue. It was, however, recognized that further consideration of this vexing issue might eventuate following the additional detailed discovery that has since ensued. The present motions were thoroughly briefed and fully argued upon completion of discovery and preliminary to a series of noticed pretrials that will precede trial in June.

In dealing with these motions this Court is governed by the mandate from the Court of Appeals. Plaintiff's original complaint seeking damages against representatives of the Air Force was found to be time-barred, but, on remand, Butterfield survived as a defendant. The Court of Appeals held that Butterfield, a member of the White House staff, was "a person of influence in a different center of power." Although he was alleged to have conspired with the Air Force defendants, he was held for trial because the record before the appellate court did not compel the view that plaintiff should have been aware of "White House deliberations concerning his government employment" prior to1973. The Court of Appeals recognized that while new Air Force defendants could not be added plaintiff could, by reason of his John Doe allegations, add new White House defendants "subject to the requirement of due diligence." It also was noted that Butterfield's own involvement could be re-examined upon a fuller factual record in the light of the due diligence standard.

As the action now stands, plaintiff proposes to proceed against the three movants, all participants in the White House "center of power." He claims that they conspired with Air Force representatives and with others in the White House to bring about his dismissal by the Air Force and to block his reinstatement to government service in the immediate aftermath of the termination.

Discovery into White House involvement was effectively curtailed in the spring of 1974, following early summary judgment motions from the Air Force defendants. Plaintiff's first meaningful opportunity to resume his inquiries on this score came after remand, and it is not seriously disputed that he proceeded with due diligence from that point. Defendants focus instead on the three-year period following the final events fixing alleged liability, which occurred early in 1970. They argue that by early 1973, plaintiff was on clear notice of facts and circumstances enabling him intelligently to prosecute his cause of action. His failure to proceed at that time is said to bar this action against any White House officials, including the President.

An assessment of plaintiff's diligence in ferreting out White House involvement must take account of the appellate court's conclusion that plaintiff was thwarted by the Air Force's successful claim of executive privilege. The privilege, invoked by Secretary Seamans before the Civil Service Commission when inquiry was directed toward White House participants, could only have been authorized by or on behalf of the President. In other respects, plaintiff's inquiries also have been frustrated or ignored in the interests of White House secrecy.

There is still no proof that plaintiff could have proceeded more diligently against Butterfield. Although Butterfield did nothing himself to conceal his involvement, his alleged participation was not even suspected until his memorandum surfaced during the Senate Watergate hearings in the summer of 1973. Having been shielded from plaintiff's inquiries by the broad mantle of White House secrecy, he was promptly and responsibly joined as a defendant once his presence became known.

In contrast, Harlow's involvement in plaintiff's situation was suspected shortly after the termination.

But as far as Harlow's participation in the conspiracy is concerned, there was no conduct known to plaintiff indicating that he may have affirmatively urged termination or prevented reinstatement to government service. Indeed, plaintiff's prime source of information during this time, Mollenhoff, apparently considered Harlow an ally. Although the evidence is disputed, active concealment by Harlow can be implied on plaintiff's version of the facts. Only much later was plaintiff able to discover what he now alleges was Harlow's true role as part of the conspiracy.

Turning to former President Nixon, the Court confronts a mass of contradictory proof. It is essential in applying the law of diligence to avoid an examination of the proof with hindsight, distorted by subsequent revelations of White House prevarications and duplicity. Undeniably, plaintiff confronted some indicia of "White House involvement" by early 1973, and he voiced certain suspicions concerning the President's role during the Civil Service proceeding. Once again, however, contemporaneous documents suggest an understandable reluctance to attribute personal knowledge and intent-to-harm to the Chief Executive himself. *See, e.g.*, letter from Mollenhoff to Nixon, Feb. 13, 1973, defendant Nixon's exhibit 52.

A personal suit against a sitting President of the United States should never be undertaken lightly, given the deference due his office and all the uncertainties as to his amenability to suit but recently settled by *Halperin v. Kissinger*, 606 F.2d 1192 (D.C. Cir. 1979). Plaintiff's former counsel apparently believed that Nixon's press conference admission of responsibility and the immediate confusing retraction provided insufficient grounds, and this Court so held when the first summary judgment motions following remand

were decided. Although tapes and other discovery now clearly justify including him as a defendant, the most energetic probing has not disclosed a basis for holding that plaintiff, with diligence, should have proceeded earlier. At most it appears plaintiff had reason to believe that Nixon had been informed of allegations regarding the injustice of plaintiff's termination and had declined to become involved. But even then plaintiff's sources felt the President had somehow been misled. Given all the contemporaneous confusion, the trail to the highest office in the land was murky and the White House continued to conceal.

The motions of each defendant for summary judgment on the grounds that suit is barred by the Statute of Limitations are denied.

/s/ Gerhard A. Gesell
United States District Judge

March 26, 1980

APPENDIX B

UNITED STATES CONSTITUTION

AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * * * *

5 U.S.C. §7211

Employees' right to petition Congress

The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied.

* * * * *

18 U.S.C. § 1505

§1505. Obstruction of proceedings before departments, agencies, and committees

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any joint committee of the Congress; or

Whoever injures any party or witness in his person or property on account of his attending or having attended

such proceeding, inquiry, or investigation, or on account of his testifying or having testified to any matter pending therein; or

Whoever, with intent to avoid, evade, prevent, or obstruct compliance, in whole or in part, with any civil investigative demand duly and properly made under the Antitrust Civil Process Act, willfully withholds, misrepresents, removes from any place, conceals, covers up, destroys, mutiliates, alters, or by other means falsifies any documentary material, answers to written interrogatories, or oral testimony, which is the subject of such demand; or attempts to do so or solicits another to do so; or

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress –

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

APPENDIX C

Tape: 845b
Meter Reading: 378

TRANSCRIPT OF PART OF CONVERSATION BETWEEN RICHARD NIXON AND CHARLES COLSON

4:17 P.M. January 31, 1973
OVAL OFFICE

President: Like, out there, I was very informal today, you know. I just, you know, talked quite a while when I wanted to. Kidded around with Mollenhoff. [Laughing] He, he sure presses though.

Colson: That was a tough one too—Eh—

P: Well, it's all right, all right.

C: That's one you, one you—

P: That's what I—However, it's his perfect right. It's good to answer [to disarm him] [unintelligible].

C: Well, I'm just delighted you said you wanted a written opinion because (pause) Course I don't know that that Watergate question, you know is (pause) is gonna be a very delicate one (pause). If—

P: Don't we have to have a written opinion?

C: We should have an opinion.

P: Yeah, I don't want to do it off the top of my head.

C: Oh no, no. I was so relieved when you did that because Mollenho—I could tell what Clark was doing. He was, he was working, working around on—

P: Yeah.

C: the Fitzger—

P: This guy that was fired. I'd marked it in the news summary. That's how that happened. I said get rid of

that son of a bitch. You know, 'cause he is, he's been doin' this two or three times. So Seamans, who isn't much of a sandbagger, uh, will get rid of him I understand, uh, claimed executive privilege because he knew that I had ordered it.

C: Right.

P: But anyway, that's why I didn't back off of that. But, uh, there are areas as far as Watergate's concerned, I can't claim privilege.

Tape: 845b
Meter Reading: 580

TRANSCRIPT OF PART OF CONVERSATION
BETWEEN RICHARD NIXON AND
CHARLES COLSON

4:17 P.M. January 31, 1973
OVAL OFFICE

Colson: And if you get a fluke like the executive privilege thing, the easy answer is—

President: [unintelligible]

Colson: Yes, I invoked it. It was properly invoked under these circumstances, and, uh, if you are confused about my position, I'll be glad to issue a policy statement [unintelligible] on a very complex subject that involves the operation of the Government, period. And move on to something else.

Tape: 845b
Meter Reading: 705

TRANSCRIPT OF PART OF CONVERSATION
BETWEEN RICHARD NIXON AND
JOHN EHRLICHMAN

4:32 P.M. January 31, 1973
OVAL OFFICE

President: Actually I was going to check [unintelligible] curiously enough on Watergate and executive privilege.

Ehrlichman: Well I should've—but I—

P: It didn't make any difference.

E: That's something about [unintelligible].

P: What I, what I, no, what I did make a bit of difference about with Dean; we were talkin' about it and I uh, I was pressed for the moment by our friend—

E: Yeah.

P: [unintelligible] there.

E: Yeah.

P: And I, I think I've handled it in a way that probably is a good thing for us to do. You should have the most godawful gobbledygook answer prepared. Just put it out on executive privilege. Something that will allow us to do everything that we want. Our—

E: I lean—

P: I frankly took the line which uh which uh to give them that or the Congress. I, I want to cooperate the I'm going to have it like Mr. Flanigan. We made him available—

E: Right.

P: and so forth. On the other hand uh we have to stand forth, you understand?

E: I've been making the rounds up there. I've talked to Ervin and all these people and uh that I've been showing them the letter that you wrote Moss back in '69 that says all that same thing.

P: Well, why don't you just brush the letter off and, in order to get it, why don't you just give to Mollenhoff as an exclusive?

E: All right.

P: Why not?

E: Well, the others'll ask Ziegler for it I imagine in due course. But—[unintelligible].

P: [unintelligible] give it to Mollenhoff.

E: And then he can say, uh, he can give that he's asked Ziegler for it.

P: All right. And Mollenhoff puts it out and Ziegler says, yes, Mollenhoff had this thing—

E: Uh.

P: [unintelligible] Clark—

E: Well—

P: won't satisfy 'em.

E: He wasn't doin' you any favors today, I'll tell you that, that it was Mollenhoff saying (pause) goddamn on that specific case.

P: I know that he's been having a problem.

E: Uh.

P: Actually on that case you know I recently recall specifically telling somebody (pause) Harlow.

E: Uh, he talked to Harlow about it I believe, but it uh as we've been reconstructing it—

P: When?

E: When Harlow was here. This case arose way early in the administration.

P: I thought it was a later—

E: No, no, no, no this is that guy that, uh, ratted on the C5A overruns.

P: Oh, yeah.

E: Way back.

P: But he's still in the Government.

E: And, no he's not and uh he's appealed to the Civil Service Commission to be restored.

P: I'm thinkin' of another case. Well, any rate, I backed it up—

E: Yeah.

P: which I shouldn't.

E: Yeah. Well, that was fine and we're—

P: Seamans claimed it.

E: we're coverin' your tracks.

P: I didn't want to have any indication of somebody down the line having [been] used privilege uh without—

E: OK, it's OK, we're coverin' his tracks. Uh, Seamans was wrong, he had no right to invoke it, but you backed him up and we can put it, we can put it together in such a way that everything's OK, and uh, don't worry about it.

Tape: 845b
Meter Reading: 870

TRANSCRIPT OF PART OF CONVERSATION
BETWEEN RICHARD NIXON AND
JOHN EHRLICHMAN

4:32 P.M. January 31, 1973
OVAL OFFICE

President: Uh—let me say that I, I've read this case, John. I'm thinking of another guy, actually, I—I—

Ehrlichman: You're thinking of that Navy fellow that talked about Ash. Yeah, the liti—

P: [unintelligible]

E: —this was four years back.

P: You see I had two names—

E: Yeah.

P: —in my mind. Well, it wasn't, of course, that I—

E: No problem.

P: —didn't really, didn't really know—

E: No problem.

P: —the question. But I had to back up the son of a bitch Seamans.

E: Here's what we've done. Just so you get a feel of it. You know the procedure is if a cabinet officer wants to invoke executive privilege he refers it to the Attorney General.

P: Yeah.

E: —says I won't answer the question now, refers it to the Attorney General—

P: Yeah.

E: —and it eventually comes to you if it's, if it's meritorious. So I—

P: I invoke.

E: That's right, and so what, what we're saying is, by the language that Seamans used, he was beginning that process. Here it goes on. Meantime, he has referred this to the Attorney General. The Attorney General's going to look at it and make a decision as to whether he should answer the question or not. And, you were aware of this fact and you acquiesced in the procedure being started. He made no final ruling.

P: [unintelligible] by that time. But, basically, I said a little more that. I said—

E: No, you were actually pretty good when you read the strict words.

P: I understood, I understood what it was and I approved—uh, I was aware of the case—

E: Yeah.

P: —which I was. Harlow had raised it with me I think.

E: That's correct. That is, way back—

P: Early part of [unintelligible]—

E: So did Clar—, so did Mollenhoff, interestingly enough, uh, this guy, had talked with both Mollenhoff and Harlow here. And I believe [that] at one time or another they both talked to you about it. But Harlow particularly talked to you about it. But you see [one fact]—

P: [unintelligible] canned.

E: —whether or not he should be, uh, well, he really wasn't fired, he was sort of transferred into a non-existent job.

P: So Harlow [unintelligible].

E: Oh yeah, yeah, definitely.

P: Well, that's what I thought.

E: He was a, he was a thorn in everybody's side, you see—

P: Yeah, well, the point was not that he was complaining about the overruns, but that he was doing it in public[ly].

E: That's the point; and cutting up his superiors.

P: That's right.

E: Yeah.

P: And not, and frankly, not taking orders.

E: Well, uh I, I got a, a memo here whi' which the facts of the, of the whole Fitzgerald thing—[unintelligible]

P: Might as well put it out, just put out the procedure and so forth and so on. And, uh—

E: On the other thing—

P: The uh, uh, the uh, the uh, with your executive privilege one, just let, uh, if you want, just let, uh—

E: I would rather have Ron just give it to Clark and, uh, let him run with it.

P: Right.

E: Turn him on—[unintelligible]

P: [unintelligible] turn on, but at least it'll help a little, you know.

E: It [sure would/should].

P: Here's the reason I'd give it to Clark. We know that he's been bitching about a lot of things, and so forth

and so on. And they think that around here simply because somebody bitches that it [unintelligible] I don't want people to get the impression somebody has to be a hundred percent, John.

E: [unintelligible]

P: Nobody, nobody around here, nobody on our side that would be a hundred percent, except [unintelligible] and, uh, and we [unintelligible] what we [unintelligible].

E: Uh huh.

P: And nothing we can expect never comes to this kind of administration.

E: I getcha.

P: On the other hand, therefore, that they're, that they're on and off, uh, uh, Ziegler was pissed off at him and I wanna do some [unintelligible]. However, [unintelligible] and I say he doesn't have to be a hundred percent. The, uh—at least Mollenhoff doesn't have a double standard. As I said.

Tape: 43-A
Meter Reading: 602

TRANSCRIPT OF PART OF TELEPHONE CONVERSATION BETWEEN RICHARD NIXON AND RON ZIEGLER

6:51 P.M. February 1, 1973
EXECUTIVE OFFICE BUILDING

President: Did you get that, uh, did you handle that problem with your uh, uh, the uh, what's that Kilpatrick?

Ziegler: Uh, Fi—Fitzgerald.

P: Yeah.

Z: No problem at all. I just went out and uh—

P: Yeah. I wouldn't let, let 'em make a big thing.

Z: No, they didn't. As a matter of fact—

P: It isn't really. It's just a question of uh—

Z: Said that you had been reviewing the transcript last night—

P: Yeah.

Z: after the dinner—

P: Yeah.

Z: when you—

P: Yeah.

Z: were working on your remarks—

P: Yeah.

Z: and so forth and you want [unintelligible] talk about it this morning and uh, and uh, after the Heath thing we discussed it and you wanted me to simply say that you were, that it had never been put before you, that uh, that uh, uh you had misspoken on that, mis-

understood the thrust of the question and wanted me to tell 'em that.

P: Uh huh.

Z: And there was no, no problem at all.

P: Uh huh. We uh—by the uh—yeah.

Z: The executive privilege part—

P: Yeah.

Z: Right.

P: Yeah, yeah.

Z: But it uh was not an issue.

P: [unintelligible] questions, as well it would be with Mollenhoff [unintelligible]

Z: Well, I've talked to Clark personally, and he's in good shape.

P: Uh huh.

Z: Matter of fact, he had called uh, uh, both Pat Buchanan and myself and said that he thought that you had, may had, uh—

P: Uh huh.

Z: Uh mis, misunderstood what he was asking—

P: No, I was—

Z: and suggested we—

P: That's right.

Z: we, uh, we handle it this way.

P: Uh huh.

Z: So he's in good shape, and we're going to give him the executive privilege, uh, statement tomorrow.

P: Good.

Z: And he's looking forward to that.

P: Good, Good. Good. Fine, fine.

PART OF A CONVERSATION BETWEEN
PRESIDENT NIXON AND RONALD L. ZIEGLER
IN THE PRESIDENT'S OFFICE IN THE
OLD EXECUTIVE OFFICE BUILDING
ON FEBRUARY 26, 1973,
BETWEEN 4:50 AND 5:15 P.M.

Ziegler: Clark Mollenhoff.

President: Oh, yeah? What's he want? [Unintelligible]?

Z: Well, he is pushing the case of, of, uh, Fitzgerald—

P: Yeah.

Z: —and, uh, I don't burden you with the details but he says that one of the generals who testified at the Civil Service Committee hearing indicates that his investigative record showed that Fitzgerald was cleared in May of 1969. Clark then goes on to point out in his letter to you that he gave me that when he was here serving as your special counsel—

P: Yeah.

Z: —that the Air Force came into his office and [unintelligible] here at the White House in December of 1965, '69, many months later and indicated that Fitzgerald was still under a question—

P: Yeah.

Z: —of conflict of interest and so forth.

P: Right, right.

Z: The point of his letter is that—

P: He wants—

Z: —he feels—

P: –[unintelligible].

Z. –something should be done.

P: Yup.

Z: He, he wants, feels that something should be done about the Fitzgerald case and if not, uh, he feels that he is compelled to testify before the Civil Service hearing.

P: Right, righ–. Well, but wait a minute, he's got, uh–

Z: See, which, which–

P: –executive–

Z: –would–

P: –privilege.

Z: –which would mean that he would be testifying before the Civil Service hearing on information that he obtained while he was working in the, for the President of the United States. He says–.

P: He didn't get it from me, though.

Z: No.

P: Did he?

Z: And he, Clark, I don't think understands executive privilege 'cause he points out in here that he, that, he said, "As I know, as you know, I disagree with the President the issue on executive privilege and would not avail myself, uh, of it, uh, under, under any circumstances. [Unintelligible]."

P: Oh, hell, let's let it go. What were the, uh, what is the situation on the case? I don't really have any, uh–

Z: Well, I don't want–.

P: –interest in it whatever.

Z: What I would like to do–

P: Yeah.

Z: –is because he has this letter and he said–

P: Right.

Z: –you know, I uh–

P: Yup.

Z: –told him that I–

P: Sure.

Z: –have seen the–

P: Sure, sure.

Z: –President. Is to have John Dean call Clark in–

P: Yeah. Right.

Z: –at your request–

P: Right.

Z: –and simply put the facts on the Fitzgerald case and see what–

P: Tell him the President wants him to–

Z: –to do.

P: –to get the facts and see what the situation is and, uh, we'll, uh, and if, bu-but it would be best if he not raise it in a, uh, [unintelligible].

Z: That's what I think.

P: [Unintelligible]. He should call him into [unintelligible].

Z: All Right, I will. I'll call Clark now.

P: Yeah. And say, "Look, that the President [unintelligible] about it and said, 'Look, that he had no particular recollection of the, of, uh, of the matter we [unintelligible] the other day. [Unintelligible] this guy he's

[unintelligible] what [unintelligible] we've got the Air Force guy [unintelligible].' "

Z: You see, this is a case of, that, that, uh—

P: Came before we—.

Z: —came before we came in—

P: Oh, yeah.

Z: —but when we came in it was all Harlow's ball game [unintelligible]. I had a call in to Bryce on it.

P: Bryce was all for canning him, wasn't he?

Z: No, I think Bryce may have been the other way. That's why I [unintelligible]—.

P: Oh.

Z: See, at one point in '69—

P: Oh.

Z: —there was some discussion about hiring Fitzgerald over here at OMB—

P: Oh.

Z: —because it was felt that he did get a bum rap over there.

P: Oh, see?

Z: But I—.

P: You see, the case I was thinking about, when you asked me, was the other case—

Z: Rule.

P: —the Rule case, that's right. I thought [unintelligible]—.

Z: Which we can't say, of course.

P: I can't go [unintelligible].

Z: And that's the one that, uh, that Admiral Kidd did such a great job in handling–

P: Yeah, yeah.

Z: –but Clark being such a zealot, as he is–.

P: No, well, he may be right.

Z: He might be right.

P: That's what I wanna tell him. The President has made, he says he may be right and says to get to the bottom of it. We'd like for him, "the President asks that you [unintelligible] talk to Dean and he says that the President has some recollection that Harlow has some information on it. Why don't you talk to Harlow and then to, uh, present the facts to me? And I'll see what we could do."

Z: All right.

P: "[Unintelligible] the President's taken a personal interest in it." I don't want him to write [unintelligible]–

Z: Oh, no.

P: –but he can later. Tell him that–

Z: On a private basis.

P: –that he's privileged to write it later, but I, uh, I said that I felt that I was [unintelligible] going to get [unintelligible] to the bottom of this case, tell him [unintelligible] did, we did [unintelligible]–

Z: Yeah.

P: –you know, uh–

Z: OK.

P: –uh, [unintelligible] and ask, tell him I'd be interested in his personal evaluation of, he thinks he's [unintelligible].

Z: Yup.

P: [Unintelligible].

Z: In spite [unintelligible].

P: All right. Fine. Tell him—.

Z: He sent you a call in [unintelligible]—

P: Yeah.

Z: —[unintelligible] tomorrow about a Kent Cook, retired Air Force weapons analysis who died of a heart attack in '54, and Clark said that [unintelligible] living on a very low salary in terms of this whole bureauc—. See, Clark had a—

P: Who was Kent [unintelligible]?

Z: —[unintelligible]—.

P: Did we do it?

Z: No, we didn't do it.

P: Jesus Christ.

Z: That this is one of these—.

P: Well, Clark [unintelligible]. You gotta remember that he, uh, also in fairness to, Ron, Clark, uh, you [unintelligible].

Z: Well, I [unintelligible].

P: [Unintelligible] Clark does, uh, also one of those fellows that, tries to, tried to defend that other, that, that State Department, you remember that guy that we put on, uh, [unintelligible] no, he had, I think he was with Willard Edwards on that case. You remember that case?

Z: I don't remember the name.

P: Well, the one that involved, uh, the, the fellow that they canned at the State Department, you know,

because he, uh, conducted security [unintelligible]. Remember we put him on the [unintelligible]?

Z: Oh, yeah, [unintelligible] Tucker.

P: [Unintelligible]. Put Tucker in.

Z: [Unintelligible].

P: Well, just say the President has said that this, this intrigues him. The case intrigues him and he thinks Clark's an honest reporter and he wants the facts and he's asked Dean to get the facts and also discuss executive privilege with him. Well, to get the facts. He'd also like for him to get, [unintelligible] he wants Harlow, and get Harlow [unintelligible] on it. Now, we're not, we're not, uh, we, uh, this is not [unintelligible] no skin off our backs. We just wanna know the facts, but he must not write it until we get the facts. Then I'll look at it. That it'll be per– [unintelligible]. When they get, Dean gets it properly presented, it will be presented to me and I'll make a judgment on it myself.

Z: All right.

P: Fair enough?

Z: That's good.

P: And he's, I thought, and I said, [unintelligible], "Well, the President's expected to take a personal interest in the [unintelligible], and he's decided to [unintelligible] on this himself. You can't write it yet. First talk to Dean. He also'd like you to talk to Harlow. Both Dean and Harlow we will ask for an opinion on it. And we'll [unintelligible] get, get the Air Force's, uh, judgment [unintelligible]. Get their side of it too, and, uh, uh–."

Z: The reason I raise this in this manner [unintelligible] –.

P: Well—.

Z: I just don't want him to hit you [unintelligible].

P: [Unintelligible]. Well, you say, "This is, this is very interesting, and uh—."

APPENDIX D

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit
September Term, 1979

No. 80-1406

A. Ernest Fitzgerald

v.

Alexander P. Butterfield,
Appellant
H. Robert Haldeman, et al.
(Civil Action No. 74-0178)

No. 80-1047

A. Ernest Fitzgerald

v.

Alexander P. Butterfield, et al.
Richard Nixon,
Appellant
(Civil Action No. 78-0178)

No. 80-1408

A. Ernest Fitzgerald

v.

Alexander P. Butterfield, et al.
Bryce N. Harlow,
Appellant
(Civil Action No. 78-0178)

[Filed Apr 30 1980]

ORDER

It is ORDERED, *sua sponte,* that the above captioned cases are consolidated.

FOR THE COURT:

George A. Fisher,
Clerk

By: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit
September Term, 1979

No. 80-1406

A. Ernest Fitzgerald
v.
Alexander P. Butterfield,
Appellant
H. Robert Haldeman, et al.
(Civil Action No. 74-0178)

No. 80-1047

A. Ernest Fitzgerald
v.
Alexander P. Butterfield, et al.
Richard Nixon,
Appellant
(Civil Action No. 78-0178)

No. 80-1408

A. Ernest Fitzgerald
v.
Alexander P. Butterfield, et al.
Bryce N. Harlow,
Appellant
(Civil Action No. 78-0178

[Filed Apr 30 1980]

BEFORE: Tamm, Mikva and Robb, Circuit Judges

ORDER

Upon consideration of appellee's motions (1) to dismiss for lack of jurisdiction, or, in the alternative, for summary affirmance and (2) for expedited consideration of his motion, of appellants' oppositions thereto, and of the District Court's request that this matter be expedited, it is

ORDERED by the Court that the motion to dismiss is granted.

Per Curiam

Circuit Judge Robb did not participate in the foregoing order.